STATE OF MICHIGAN

COURT OF APPEALS

JERRY SAURMAN,

Plaintiff-Appellant,

v

BRICE BOSSARDET, GRANDVILLE EAST CONDOMINIUMS, LLC, UNITED BANK MORTGAGE CORPORATION, JANE NELSON, INGRID NELSON, J. SCOTT TIMMER, and BRUCE BYTWERK,

Defendants-Appellees.

UNPUBLISHED
July 3, 2007

No. 268255
Kent Circuit Court
LC No. 05-05694-CK

JERRY SAURMAN,

Plaintiff-Appellee,

v

BRICE BOSSARDET,

Defendant-Appellant,

and

GRANDVILLE EAST CONDOMINIUMS, LLC, UNITED BANK MORTGAGE CORPORATION, JANE NELSON, INGRID NELSON, J. SCOTT TIMMER, and BRUCE BYTWERK,

Defendants.

No. 269550
Kent Circuit Court
LC No. 05-005694-CK

Before: White, P.J., and Zahra and Kelly, JJ.

WHITE, P.J. (*dissenting*).

I respectfully dissent. I would reverse in Docket No. 268255, and affirm in part and reverse in part in No. 269550.

I

Plaintiff's first argument focuses on the language "[t]he balance of the assignment fee being Ninety Thousand Dollars ($90,000) shall be due and payable at the closing on the Subject Property," and asserts that the circuit court erred in construing the Assignment Agreement as unambiguously providing that the additional $90,000 was not payable, although Bossardet's company closed on the property. I agree. I do not take issue with the circuit court's finding that plaintiff assigned to Bossardet rights under the specific purchase agreement[1] referred to in the Assignment Agreement.[2] However, the Assignment Agreement provides for payment "at the closing on the Subject Property." It does not state "upon closing under the terms of the purchase agreement." Further, paragraph 3, entitled "Closing" speaks in terms of closing occurring or not occurring, without reference to closing under the purchase agreement. Additionally, the Assignment Agreement speaks of Bossardet purchasing rights in and to the purchase agreement. When Humble Hollanders was unable to close due to title problems, and Bossardet was prepared to allow more time, instead of enforcing his rights under the agreement, Bossardet accepted Bytwerk's statement that he would not extend the agreement. Bossardet then entered into a new agreement with the sellers and closed. Clearly, Bossardet's and the seller's ability to enter into

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[1] The circuit court's second opinion does not address this issue. Its first opinion concluded:

> The language of the assignment is unambiguous. Pursuant to paragraph 3 of the assignment, if defendant did not close by March 5, 2005, pursuant to the purchase agreement that was the subject matter of the assignment, plaintiff had two options. Plaintiff had the choice of either keeping the $10,000 deposit as liquidated damages or returning the deposit and regaining the purchase agreement. When plaintiff learned that the property did not close pursuant to the original purchase agreement he chose not to return the deposit. Therefore, the $10,000 was his remedy under the contract.
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> Plaintiff argues that the language, "[t]he balance of the assignment fee being Ninety Thousand Dollars ($90,000) shall be due and payable at the closing on the Subject Property" requires that balance to be paid when defendant closes on the property, even if that occurs under a different purchase agreement. The court does not agree with this interpretation of the contract. The paragraph under "Recitals" states that the purchase agreement covered by the assignment is the agreement which was entered into between plaintiff and Humble Hollander [sic], LLC. It was the rights in that purchase agreement which defendant bought. This language makes clear that it was this original purchase agreement which had to be closed upon by March 5, 2005 to entitle plaintiff to the remaining $90,000. Had plaintiff wished to prevent defendant from purchasing the property if the closing did not occur by that date, he could have done so by expressly stating that as a clause in the assignment.

[2] The "Recitals" section is quoted in the majority opinion, p 2.

this new agreement without fear of liability under the original purchase agreement was based on the fact that Bossardet owned the rights under the first agreement. In other words, the only reason Bossardet and the seller were able to enter into the new agreement was because Bossardet held the rights under the first agreement. Moreover, plaintiff asserted that the terms of the purchase agreement pursuant to which Bossardet closed were substantially the same as those under the purchase agreement that was the subject of the assignment, except that the assignment fee was split between Bossardet and the seller. Thus, I conclude there were genuine issues of material fact whether a closing occurred within the meaning of the Assignment Agreement, and the circuit court erred in concluding that the Assignment Agreement unambiguously provided that the balance of the fee was not payable.

Plaintiff next challenges the circuit court's conclusion that the Assignment Agreement unambiguously provides that plaintiff's right to refund the $10,000 and cancel the assignment only arises if the failure to close by March 5, 2005 is due to Bosseret's default. I agree. Plaintiff's interpretation of ¶ 3 is that the failure of Bossardet to close on the property by March 5, 2005, and the failure of Bossardet to close on the property, at all, due to his own default, provide two separate bases upon which to cancel the assignment. Plaintiff argues that under the plain language of ¶ 3's second sentence, after March 5 passed without a closing taking place, plaintiff had the right to elect either to retain the $10,000 deposit, or to return the deposit, cancel the Assignment and take back the purchase agreement. The Assignment Agreement is clearly reasonably susceptible of such an interpretation. In fact, even Bossardet ascribed this meaning to the agreement in his initial motion, as did the circuit court in its initial opinion. I thus conclude that the circuit court erred in ruling that the agreement unambiguously provided to the contrary.

Plaintiff next asserts that the circuit court also erred when it construed ¶ 3 to unambiguously provide that the contract expired on March 5, 2005. The court apparently read the March 5 clause as meaning that if Bossardet failed to close by that date, the Assignment Agreement terminated: "As no closing occurred by March 5, 2005, the Assignment expired."

The court's reading went beyond the plain language of the Assignment Agreement—which neither sets forth an expiration date, nor refers to "expiration" at all.[3] The only provision

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[3] The purchase agreement also addressed closing. Paragraph 18" stated:

> 18. Closing: If agreeable to both parties, the sale will be closed as soon as closing documents are ready, but not later than MARCH 1, 2005. *An additional period of fifteen (15) days will be allowed for closing to accommodate the correction of title defects* or survey problems which can be readily corrected, delays in obtaining any lender required inspections/repairs. [Emphasis added.]

Paragraph 26 of the purchase agreement stated:

> 26. Seller's [Humble Hollanders, LLC] Acceptance: The Above Offer is Hereby Accepted: [ ] As Written [X] As Written Except:

(continued…)

for the suspension of the agreement is the provision allowing plaintiff to refund and cancel. It is unclear why the Assignment Agreement itself, as opposed to the rights under the contract assigned, would ever expire or terminate.

I conclude that the circuit court erred in concluding that the Assignment Agreement is unambiguous and that there were no genuine issues of material fact whether plaintiff was entitled to receive the additional $90,000 under the agreement upon defendant's closing on the property. Further, ¶ 3 of the Assignment Agreement is ambiguous as to whether plaintiff could elect to take back the purchase agreement if defendant Bossardet, without defaulting, failed to close by March 5, 2005, rather than being limited to the exclusive remedy of retaining the $10,000 deposit. Additionally, I conclude that the circuit court erred in concluding the Agreement expired on March 5, 2005.

For these reasons, I would reverse the dismissal of plaintiff's contract claim, and remand for further proceedings.

II

The gist of plaintiff's tortious interference claims, conspiracy to interfere with contractual and business relation claims, and conspiracy to breach a contract, is that Bytwerk, Timmer and the Nelsons became angry when they learned that plaintiff was to make a profit of $100,000 on the sale to Bossardet, that Bytwerk refused to accept Bossardet's offer of additional time to cure the title defect because he, Timmer and the Nelsons didn't want plaintiff to get his $100,000 and preferred to deal with Bossardet directly. Bytwerk declined to close under the original purchase agreement, and Bossardet did not force the closing. Instead, Bytwerk and Timmer entered into a new purchase agreement with Bossardet, based on essentially the same terms, except that the parties split the assignment fee. The circuit court dismissed these tort claims based on its determination that Bossardet did not breach the Assignment Agreement, and that, without a breach on Bossardet's part, plaintiff could not establish requisite elements of these tort claims. Because I disagree with the underlying determination and would reverse the dismissal of plaintiff's contract claims, I would reverse the circuit court's dismissal of these tort claims as well.

Plaintiff also challenges the dismissal of his silent fraud claims. "In order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure. *M & D, Inc v McConkey*, 231 Mich App 22, 31; 585 NW2d 33 (1998). "[H]ighly misleading actions can support a claim of silent fraud, absent a specific inquiry." *Id.* at 33. "A representation can be action or conduct and can be actionable as silent fraud if that action or conduct is intended to create a misimpression to the opposing party." *Id.p*

The court dismissed plaintiff's silent fraud claim in favor of defendants Bossardet, Timmer and Bytwerk based on its conclusion that they did not have a duty to disclose to plaintiff

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1. Closing to be on or before Feb 15, 2005.

Bossardet's failure to close on the property by March 5, 2005 without some fault on Bossardet's part that prevented the closing from occurring as scheduled. However, I conclude that this determination is based on the erroneous conclusion that the Assignment Agreement unambiguously did not afford plaintiff the right to take back his rights under the purchase agreement if closing did not occur, for any reason, by March 5, 2005. Thus, I would reverse the dismissal of plaintiff's fraud claim against Timmer and Bytwerk.

I would also reverse the dismissal of the fraud claim as to Bossardet. In *Simmons v Telcom Credit Union*, 177 Mich App 636, 642; 442 NW2d 739 (1989), on which plaintiff relied below, this Court noted:

> [T]here are many circumstances under which the courts of this state have imposed a duty to speak upon a defendant. Hence, in a fraud case, the suppression of information may constitute silent fraud when there is a legal or equitable duty of disclosure. *U S Fidelity & Guaranty Co v Black*, 412 Mich 99, 126; 313 NW2d 77 (1981). The duty of disclosure arises where the party to a business transaction discovers information prior to the time the transaction is consummated and where fair dealings require a disclosure of the new information. *Id.*, p 127. . . .

The circuit court paid lip service to *Simmons* but went on to conclude that fair dealing did not require disclosure on Bossardet's part because the Assignment Agreement was a "typical arms-length business transaction" and, given that Bossardet did not default on his obligations under that Agreement, it would have made no difference had Bossardet disclosed to plaintiff that the closing did not occur by March 5, 2005, because plaintiff's remedy under the contract remained the same (retention of the $10,000 deposit). As discussed above, I disagree with these determinations, and would reverse the dismissal of plaintiff's fraud claim against Bossardet.

Regarding the Nelson defendants, the circuit court concluded that plaintiff failed to provide any evidentiary support for his fraud claim against them. I disagree. Plaintiff's affidavit stated that he believed Jane and Ingrid Nelson, both licensed real estate agents employed by Keller Williams, acted as his agents in the transaction because they prepared the purchase agreement for him, instructed him on what to include in the purchase agreement, presented his offer to Humble Hollanders, the property was already listed for sale with Grubb & Ellis as its selling broker, Jane Nelson requested a $5,000 commission fee on the closing of the property, and neither Jane or Ingrid Nelson furnished him with a Disclosure of Agency Relationship form or otherwise indicated they did not represent him, or that they represented someone else. The record also supports plaintiff's assertion that virtually no discovery had occurred as to the Nelson defendants,[4] who moved for summary disposition in lieu of filing answers to plaintiff's first

[4] Regarding discovery, the only items I found in the record are a notice of scheduling conference sent by the court setting a conference date of September 26, 2005, that stated that the parties need not appear if they could agree on discovery deadlines and expert witness deadlines. By letter to the circuit court dated and faxed on September 26, 2005, plaintiff's counsel advised that the parties had agreed to adjourn the scheduling conference and would submit a stipulation and order shortly. No such document is in the record, however.

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amended complaint. I thus conclude that summary dismissal of the silent fraud claims against the Nelson defendants was prematurely granted.

Docket No. 269550

In light of my conclusion that I would reverse of the grant of summary disposition, I would automatically affirm the denial of costs under MCR 2.405(D)(3). However, I also conclude that the court did not err in denying actual costs under the court rule.

On February 17, 2006, Bossardet filed a motion for costs and attorney fees incurred as a necessary result of plaintiff's rejection of the offer to stipulate to entry of judgment. Defendant incurred actual costs and attorney fees of $15,858.78 between July 27, 2005, the date of the offer, and the date of filing his motion. On February 24, 2006, Bossardet amended his motion for imposition of costs to seek additional fees he personally incurred after he was required to indemnify defendant United Bank (which had provided mortgage financing to Grandville East Condominiums and its members to acquire the former Grandville East apartments complex) for attorney fees it incurred in defense of the amended complaint (in the amount of $10,287.26).

The circuit court denied defendant's motion, stating from the bench that the offer "was not a bona fide offer, it was a de minimus offer, it was an offer that –to set the parties up for the awarding of fees which they now ask for."[5]

I conclude the circuit court did not abuse its discretion in applying the interest of justice exception. *Knue v Smith*, 269 Mich App 217; 711 NW2d 84 (2005), rev'd on other grounds 478 Mich 88; __ NW2d __ (2007). The circuit court noted that Bossardet, as an individual, engaged in misconduct that would justify the application of the exception, MCR 2.405(D)(3). Bossardet's argument that the court did not focus on the circumstances of the case when the offer to stipulate was made is inaccurate. The court's determination was based on Bossardet's acts of misconduct that occurred before he made the offer of judgment.

Lastly, I agree that if the dismissal is sustained, the circuit court should award costs and fees taxable in a civil action as enumerated in MCL 600.2405.

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Plaintiff filed his first amended complaint soon after, on October 10, 2005. In lieu of answering plaintiff's amended complaint, defendant Timmer and the Nelson defendants filed a summary disposition motion. Plaintiff responded to these "new defendants'" motion on December 13, 2005. The circuit court heard all defendants' motions on January 11, 2006, and entered its opinion and order dismissing all of plaintiff's claims on January 23, 2006.

I found nothing in the record after the September 26, 2005 letter to the circuit court indicating that the parties agreed on discovery dates. In support of their motions, all defendants submitted affidavits.

[5] Defendant Bossardet failed to produce the transcript of the March 3, 2006 hearing on his motion, at which the court stated its reasons for denying the motion on the record. I address the issue nonetheless because both parties quote the transcript and there is no dispute what the circuit court stated from the bench.

I would reverse in Docket No. 268255, and affirm in part and reverse in part in Docket No. 269550.

/s/ Helene N. White